

## Will Dow challenge Quebec pesticide law?

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TORONTO — Dow AgroSciences is mulling over a NAFTA challenge to Quebec's law banning the cosmetic use of pesticides, setting a spotlight on one of the most controversial clauses of the trade agreement among Canada, the United States and Mexico.

Under the trade pact, companies can claim that new laws or regulations are indirect expropriation of property without fair compensation, and Dow says it is out \$2-million over the pesticide ban.

Although the company signalled in August that it was considering taking on Ottawa by filing a NAFTA notice of intent over the issue, it hasn't formally decided to go ahead with the legal action. But Brenda Harris, the company's manager of regulatory and government affairs, says a decision is pending and will be made this month.

If the company decides taking on Quebec's popular pesticide ban is worth the fight, it will likely intensify the efforts within the environmental community to have the trade deal revised to stop such corporate challenges.



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Dow AgroScience argues a Quebec regulation prohibiting the use on residential lawns of 2,4-D, a dandelion-killing herbicide it makes, wasn't based on sound scientific grounds showing hazards from the residential use of its product.



The Canadian Environmental Law Association (CELA) has written to both Prime Minister Stephen Harper and U.S. President Barack Obama, asking that they repeal or amend the section of the North American Free Trade Agreement, known as Chapter 11, covering investor disputes with government over expropriation.

The group contends these provisions may discourage governments from enacting environmental or health and safety laws, based on fears that companies might claim these action harm their interests.

The section "operates as a chill [on regulation] because the government would worry, 'What if I'm going to get an investment challenge and have to fork over big dollars?'" said Theresa McClenaghan, CELA's executive director and counsel.

International Trade Minister Stockwell Day, in a recent letter to the group, indicated the government rejects criticism of the investor provisions, and says they "have served Canada well." But Mr. Day said the government is prepared to go up against Dow AgroSciences if it comes down to a dispute.

"The fact that a [notice of intent] has been served does not establish the merits of a claim. However, should this claim proceed, the government of Canada will continue to work with the government of Quebec to vigorously defend our interests," he wrote.

Under the trade pact, Dow has to file its case against the federal government, even though its objection is with a Quebec regulation prohibiting the use on residential lawns of 2,4-D, a dandelion-killing herbicide it makes. The company is irked by the pesticide ban, saying it wasn't based on sound scientific grounds showing hazards from the residential use of its product.

"I think it's a misconception that the investment chapter of NAFTA actually restricts the government's ability to regulate," Ms. Harris said. "They have the ability to regulate. What we're saying is that you have to use clear, science-based criteria."

Although Newfoundland and AbitibiBowater may also be heading toward a Chapter 11 dispute over the seizure of many of the company's assets in the province, claims that environmental rules are tantamount to expropriation are the single largest source of complaints under the provision, amounting to about 40 per cent of the 24 cases filed against Ottawa.

The most recent to be filed were in September and October, by two U.S. citizens disputing a Quebec regulation protecting Atlantic salmon, for a combined \$6-million. Four cases based on environment-related rules were filed last year, the highest annual total since the trade pact began in 1994.

Potentially the most costly dispute against the federal government was filed in 2006 by a Pennsylvania investor claiming \$355-million over a decision blocking the use of an abandoned open pit mine in Northern Ontario as a dump for Toronto's garbage.

Very few of the claims against Canada have led to substantial payments by taxpayers to businesses, although Ethyl Corp. received about \$13-million as a settlement over a disputed gasoline additive.

Ms. McClenaghan says NAFTA's provisions allowing investor claims are being viewed internationally as a weakness in the Canada-U.S.-Mexico trade pact, pointing to the fact that more recent treaties have clarifying language precluding these types of challenges.

For instance, she said the free trade agreement with Columbia that Mr. Harper announced in November has much more restrictive language over investor challenges to environmental laws.

The Canada-Columbia pact's section explaining the two countries' understanding of "indirect expropriation," said that regulations "designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation."

"That's stronger than NAFTA," Ms. McClenaghan says.

She adds the wording of U.S. trade deals negotiated since NAFTA with countries such as Australia, Singapore and Chile also make it harder to challenge valid environmental regulations. The NAFTA countries should "reconsider whether there is a need for an investment chapter at all," she says.

The idea of reopening NAFTA isn't popular in the business community.

"I'm not aware of a huge problem here in terms of sound environmental legislation and regulatory decisions being overturned arbitrarily," said Ross Laver, spokesman for the Canadian Council of Chief Executives.

He said the number of challenges is "remarkably small" compared to the large volume of North American trade and that the pact has delivered major benefits. "The experience of the last 13 years has been that Canada has done very well by this agreement."

*NAFTA challenges to Canadian environmental regulations:*

- **Ethyl Corp.** over a gasoline additive. The dispute, begun in 1997, settled for about \$13-million (U.S.).
- **S.D. Myers Inc.** challenges a temporary ban on exports of PCBs. The dispute, begun in 1998, settled for \$5-million.
- **Sun Belt Water Inc.** challenges British Columbia's moratorium on bulk water exports in 1998. It claims losses of about \$200-million. The federal government says the claim isn't valid.
- **Chemtura Corp.** challenges a ban on the pesticide lindane, claiming \$83-million in losses. The dispute began in 2001.
- **Albert Connolly**, a U.S. investor, disputes an Ontario decision to turn a property with marble deposits into parkland. The case is filed in 2004, and Foreign Affairs says it is invalid. The dollar amount claimed was not disclosed.
- **V.G. Gallo**, a U.S. investor, claims losses of \$355-million over an Ontario regulation blocking the use of an abandoned mine for Toronto's garbage. The case began in 2006.
- **Dow AgroSciences** challenges a Quebec ban on the use of the herbicide 2,4-D on lawns. The case began in August and claims \$2-million in damages.
- **Bilcon**, a Delaware company, challenges a ruling blocking a quarry in Nova Scotia. The case began in 2008 and the company is claiming \$188-million.
- **William Greiner and David Bishop**, two U.S. investors, separately challenged Quebec regulations on salmon fishing in 2008. The claims are for combined losses of \$6-million.

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